IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CSX TRANSPORTATION, INC., and THE UNITED STATES OF AMERICA,	)	
Appellants,	)	
v.	)	No. 05-5131
ANTHONY WILLIAMS, Mayor of the District of Columbia; THE DISTRICT OF COLUMBIA, and SIERRA CLUB,	)	
Appellees.	)	

EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL AND FOR SUMMARY REVERSAL

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INTRODUCTION

On February 1, 2005, the D.C. Council passed an ordinance banning all interstate shipments by rail or truck of four categories of hazardous materials ("Banned Materials") through the "Capitol Exclusion Zone" within the District of Columbia. See "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005," D.C. Bill 16-77 ("District Act"). (Appendix ("A") 45-50). On April 18, 2005, the district court rejected the contentions of CSX Transportation ("CSXT") and the United States that the District Act is preempted by federal law; it denied CSXT's motions for a preliminary injunction and for summary judgment. The court also denied any motion to stay or enjoin enforcement of the Act pending appeal. See Mar. 23, 2005 Tr. 179 (A1840); Dec. 76. The District will begin to enforce the District Act on April 20, 2005.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure and of this Circuit, respectively, CSXT requests that, prior to April 20, 2005, this Court enjoin enforcement of the District Act pending expedited review.[1] CSXT further submits that the underlying appeal involves only questions of law, and therefore that this Court may summarily reverse the court's denial of a preliminary injunction and order the entry of a permanent injunction against enforcement of the District Act. Circuit Rule 8(b).

This Court's well settled standard for injunctive relief is easily satisfied here. On the merits, the District Act is preempted by federal statutes that make eminently clear that the routing of trains over the interstate rail system is subject to *exclusive* federal

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[1] CSXT was unable to apply for emergency relief seven days in advance because the district court denied the injunction April 18, two days before the District will commence enforcement of the District Act.

regulation. Indeed, the Surface Transportation Board ("STB"), the federal agency with exclusive authority over railroad routes, has issued an order declaring that the District Act is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 et seq. It is equally clear that the Act is preempted by the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"), and is *per se* invalid under the Commerce Clause. Common sense mandates the same result: A national rail system cannot operate if cities and states individually regulate railroad routes in contravention of federal authority.

Enforcement of the District Act will cause irreparable harm to CSXT and to the federal interests guarded by the Supremacy and Commerce Clauses. The substantial impairment of constitutional rights by itself constitutes irreparable harm; and here, despite a federal agency declaration that CSXT may not lawfully be subjected to the District Act, CSXT would be treated as a lawbreaker and subjected to significant penalties by the District if it asserted its federally-protected rights. In addition, CSXT would be required to divert loaded and empty cars used to carry Banned Materials to other rail lines, increasing hazardous materials traffic in other communities. This would significantly increase the overall transit time, distance and handling of cars, exacerbating the inherent risk of hazardous material transport, seriously impairing the efficiency of CSXT's rail system, and threatening its ability timely to serve its customers' important needs. Moreover, while the unrecoverable costs of complying with the District Act (in the millions of dollars per year) are an established form of irreparable harm, see *infra* at 17, even more damaging would be the reverberations of the District Act as other cities and States similarly bar rail traffic at their borders. This process has begun with the

initiation of copycat legislation in Baltimore (A1843) and California; Pittsburgh and Philadelphia have expressed interest.

Under the Supremacy and Commerce Clauses, regulation of the national rail system is a federal matter, and the Federal Government (specifically, the Departments of Justice ("DOJ"), Transportation ("DOT") and Homeland Security ("DHS")) not only has made regulatory determinations addressing the concerns implicated by the District Act, but also has declared that the Act is inconsistent with its judgment about how best to protect security throughout the nation. In this setting, the interests of CSXT, the Federal Government, and the public in the safe, efficient operation of the national rail system overwhelm the District's interest in shifting an inherent safety risk from itself to other jurisdictions. The motion for an injunction pending appeal should be granted. The order denying the motion for a preliminary injunction should be summarily reversed; in the alternative, the appeal should be expedited.[2] All parties have received telephone notice of the motion and hand-delivery of these papers.

STATEMENT OF THE CASE

The District Act and Follow-On Legislation. On February 1, 2005, the D.C. Council passed a local ordinance banning, on an emergency basis for 90 days, interstate shipments by rail or truck of the "Banned Materials" through the "Capitol Exclusion Zone" within the District. Under District law, "emergency" acts are passed on one reading and are not reviewed by Congress. Mayor Anthony Williams signed this legislation into law on February 15, 2005, and it will expire on May 15, 2005. Although

[2] The motion summarizes the background and arguments. The Appendix includes the briefing, affidavits, and exhibits submitted below.

the Act was effective upon approval by the Mayor (District Act § 9 (A49)), the District represented that it would not enforce the Act until April 20, 2005, to enable the District Court to address the preliminary injunction motion.

Under the District Act, the "Capitol Exclusion Zone" is the area "within 2.2 miles of the U.S. Capitol Building," encompassing both of CSXT's main lines within the District. *Id.* § 3(1) (A45). The ban extends to "a vehicle" or "rail car which . . . [i]s capable of containing" a Banned Material and "has exterior placarding or other markings indicating that it contains such materials" – a definition that includes loaded and empty cars. *Id.* § 4(2)(c) (A46). The Act creates a permitting system, *id.* § 5(A46), but DCDOT is authorized to issue a permit only if a carrier can demonstrate "that there is no practical alternative route" for the traffic, *id.* § 5(a) (A46).[3]

CSXT Operations. As described in the Affidavit of John M. Gibson, Jr. ("Gibson Aff.") (A412-42), CSXT operates a rail network of more than 21,000 miles in 23 states, the District of Columbia and Canada. *Id.* ¶ 13 & Ex. A (A414). CSXT's north-south main line ("I-95 Line") runs from Florida to D.C., Baltimore, Philadelphia, New York and Boston. CSXT also operates an east-west main line ("B&O Line") from D.C. via Maryland and West Virginia to Chicago and St. Louis. Both lines pass through the Capitol Exclusion Zone. *Id.* ¶¶ 6, 15-16 & Exs. B & C (A413-15, 431-34). Currently,

[3] On March 1, 2005, the D.C. Council passed the Terrorism Prevention in Hazardous Materials Transportation Temporary Act of 2005, Bill 16-78 (the "Temporary District Act"), which is substantively identical to the District Act. Mayor Williams signed it on March 17, 2005, and it was transmitted to Congress for review, pursuant to the D.C. Home Rule Act § 602 (D.C. Code § 1-206.02(c)) on March 22, 2005.

CSXT does not originate or terminate shipments of Banned Materials within the District. Rather, all such cars are interstate shipments passing through the District. *Id.* ¶ 7 (A413).

CSXT's transportation of hazardous commodities is subject to comprehensive federal regulation by DOT (as to both rail safety and security), by DHS (as to rail security), and by the STB (as to "rail transportation"). Following the September 11, 2001 attacks, DOT actively exercised its regulatory authority by issuing regulations on the security of hazardous materials rail transportation. Pursuant to those regulations, CSXT developed a security plan that was submitted to the government for review and was approved by the Transportation Security Administration ("TSA") and the Federal Railroad Administration ("FRA"). See Declaration of TSA Director Stephen J. Rybicki ¶¶ 7-9 (A2348-49). In addition, TSA undertook in 2004 the D.C. Rail Corridor Project, a comprehensive vulnerability assessment of CSXT's lines through the District. Representatives of FRA and DHS participated. TSA and CSXT are implementing the enhanced security measures recommended by TSA. *Id.* ¶¶ 11-12 (A2349-50).

Many details of CSXT's security enhancements, working with and under the regulation of TSA and other federal agencies, is security-sensitive, highly confidential information protected by federal law. See 49 U.S.C. §§ 40119, 114(s); 49 C.F.R. §§ 15.9; 1520.9 With that caveat, those measures are summarized in the Declaration of Howard R. "Skip" Elliott (A2317-22); see also Rybicki Decl. (A2346-50).

The Effect of the District Act on CSXT. The District Act prevents CSXT's use of its District lines for transportation of loaded and empty cars of Banned Materials. With respect to north-south movements (the I-95 Line), the closest alternative route available to CSXT runs west of the Appalachian Mountains through Tennessee, Kentucky and

Ohio. Gibson Aff. ¶ 33 (A419-20). The closest alternative east-west route to the north runs from Albany to Buffalo, and along Lake Erie through Cleveland, Ohio. The closest alternative east-west route to the south runs from Richmond to Charleston, W. Va. and points west. *Id.* ¶¶ 35-38 (A421-22). Diversion of hazardous commodities to these lines would significantly impair CSXT's rail service for these shipments. *Id.* ¶ 39 (A422).

Specifically, these reroutes would add hundreds of miles and days of transit time. Much traffic would be forced to move over CSXT rail lines through Cleveland – Buffalo – Rochester – Syracuse – Albany – northern New Jersey/New York City metropolitan area – and Philadelphia, increasing hazardous materials traffic in affected communities. *Id.* ¶¶ 34-38, 55 (A420-22, 426). Longer transit times and distances, increased car handlings, and longer yard dwell times all tend to increase the inherent risk of transporting hazardous materials. *Id.* ¶ 48 (A425); DOT Comments at 7-8 (A451-52).

The STB Proceeding. CSXT filed a Petition for Declaratory Order with the STB on February 7, 2005, asking the Board to declare that the District Act "is preempted by Section 10501 of [ICCTA] and that, subject to compliance with applicable federal safety and hazardous materials transportation statutes and regulations, CSXT may continue to route cars to which the DC Ordinance applies via its lines through, and in the vicinity of, the District." Petition of CSXT at 1, STB Docket No. 34662 (Feb. 7, 2005) (A567).

On March 14, 2005, the STB issued a Declaratory Order, ruling that "well-settled precedent demonstrates that the D.C. Act is preempted by 49 U.S.C. 10501(b)." *CSX Transp., Inc. – Petition for Declaratory Order* at 11 (Mar. 14, 2005) ("STB Order") (A1473). The STB also found that the District Act "unreasonably interferes with interstate commerce." *Id.* The STB Order was "effective on its date of service," *id.*,

March 14, 2005. On March 22, 2005, the District filed a petition for rehearing, but did not seek a stay of the STB Order which is now fully effective. 49 C.F.R. § 1115.3.

Proceedings Below. On February 16, 2005, the day after Mayor Williams signed the Act, CSXT filed its Complaint in this action (A19). On February 22, 2005, CSXT filed a motion for a preliminary injunction, seeking to enjoin enforcement of the District Act. (A347-406). CSXT also sought summary judgment on March 8, 2005. (A835-37).

Although not initially a party, the United States did file on February 25, 2005, a Statement of Interest ("SOI") (A757-78), in which it asserted that the District Act conflicts with federal regulations governing hazardous materials transportation, is preempted by federal statutes, and violates the Commerce Clause. The United States also explained that the District Act is inconsistent with the public interest:

> The essentially federal nature of rail transportation has been repeatedly recognized and addressed by Congress, which has delegated national rail oversight for safety, security, and commerce matters to three Federal agencies – DOT, DHS, and the Surface Transportation Board ("STB"). Under the regulatory approaches administered by those agencies, the regulation of hazardous materials shipments is accomplished at a federal, not a local, level.
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> . . .
>
> Here the United States has a keen interest in the security of hazardous materials transportation for obvious national security and public safety reasons. The United States is also interested in promoting efficiency in the transportation of hazardous materials because many such materials are vital to the public health and the national economy. For example, the nation's supply of clean drinking water is dependent upon timely shipment of large quantities of chlorine, a hazardous material, and other purifying chemicals that may be categorized as hazardous materials . . . .
>
> The D.C. Act would negatively affect the United States' interests in national security, public safety, public health, and a strong economy. [*Id*.. at 2-3, 8 (A763-64, 769) (footnote omitted).]

On March 23, 2005, the district court held a hearing on the preliminary injunction motion. The district court precluded CSXT from asserting the binding effect of the STB preemption order because the Order – issued after this action commenced – had not been referenced in CSXT's Complaint. The next day, CSXT filed a First Amended Complaint (A1851-78) which, *inter alia*, asserted a claim to enforce the STB Order and, as required by 28 U.S.C. § 2322, named the United States as a defendant. On March 25th, CSXT filed supplemental preliminary injunction and summary judgment motions to enforce the STB Order. (A1943-45). On March 30th, the United States moved to realign as a plaintiff and sought to enforce the STB Order. (A2125-26, 2121-24). On April 18, the district court granted the United States' motion for realignment.

On April 18 , 2005, the district court denied the pending motions for preliminary injunction and summary judgment and any request for a stay or injunction pending appeal. (A1840). CSXT filed a Notice of Appeal.

ARGUMENT

CSXT Is Entitled To An Injunction Pending Appeal And To A Preliminary Injunction.

To obtain an injunction pending appeal, CSXT must show that (i) it has a substantial likelihood of prevailing on the merits; (ii) it will be irreparably injured if relief is withheld; (iii) an injunction will not substantially harm other parties; and (iv) an injunction will serve the public interest. This is essentially the same standard that the district court was required to apply in deciding the motion for a preliminary injunction. See, *e.g.*, *Serano Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

I. CSXT Has An Overwhelming Likelihood of Success On the Merits.

A. The District Act Is Preempted By ICCTA.

In its March 14th Order, the STB declared that the District Act is invalid because it is preempted by ICCTA under 49 U.S.C. § 10501(b) (the STB has "exclusive" jurisdiction over "transportation by rail carriers" and over "the remedies provided under this part with respect to regulation of rail transportation").[4] CSXT is likely to succeed in demonstrating that the District Act is preempted by ICCTA because the STB Order declaring the District Act preempted is immediately enforceable in the district court.

Under 28 U.S.C. § 2321(b), STB orders are enforced in district court. Both the United States and CSXT properly sought enforcement of the STB Order in this case. See 28 U.S.C. § 2322. The STB Order stated that it would become binding on its March 14th service date; a petition for reconsideration does not alter the binding effect of the Order absent a stay. 49 C.F.R. § 1115.3(f). It is, moreover, well-established that the District Court lacks discretion to examine the validity or correctness of the STB Order, because this Court "has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of* . . . (5) all . . . final orders of the [STB]." 28 U.S.C. § 2342 (emphasis added.) See also *TRAC v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). Thus, the district court may not examine the validity of the STB Order or second-guess its conclusions; it may only enforce the Order.

[4] See *CSXT v. Ga. PSC*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) ("it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations"); *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) (ICCTA preempts state and local environmental permit laws for construction of rail line).

Vonage Holdings Corp. v. Min. PUC, 394 F.3d 568 (8th Cir. 2004), is on point. There, the court affirmed the entry of a permanent injunction based on an FCC declaratory order finding a state regulation preempted. The court concluded that "the FCC Order is binding on this Court and may not be challenged in this litigation," and that the Order "dispositively supports the District Court's injunction."[5] *Id*. at 569.

The district court found that ICCTA and the STB Order did not preempt the District Act for four reasons. First, the court held that the District Act does not "directly regulate the physical routing of trains" which "may continue traveling through the District as long as they do not carry the banned hazmats." Dec. 33. This is an incorrect and crabbed interpretation of "routing" which covers individual cars as well as trains. Second, the district court concluded that the STB Order was without effect because the STB cannot invalidate the District's laws. It is true, but irrelevant, that the STB cannot strike down the Act: The statutory scheme gives federal courts – which can strike down local laws – authority to enforce STB Orders. Third, the court found the STB Order was not final because it did not "determine rights or obligations, or have some legal consequence." Dec. 41. This is wrong, because the Order both determines CSXT's rights to transport without local interference and has legal consequences under the statute which makes it enforceable in federal court. Finally, lacking authority to second guess

[5] See also *Intercity Transp. Co. v. United States*, 737 F.2d 103, 105, 106 n.3 (D.C. Cir. 1984) ("refusals to institute declaratory order proceedings" are final orders subject to the courts of appeals' "'exclusive jurisdiction'"); *United States v. Interlink Sys., Inc.*, 984 F.2d 79, 83 (2d Cir. 1993) (because § 2342 "vests exclusive jurisdiction in the Courts of Appeals to determine the validity of administrative orders," "district courts do not have jurisdiction in an enforcement action to entertain challenges to" agency orders).

the Order, the court nonetheless held that the STB Order is wrong – a decision the court based on its erroneous interpretations of FRSA and HMTA.

B. The District Act Is Preempted By The Federal Railroad Safety Act.

In enacting FRSA, 49 U.S.C. §§ 20101-20153, Congress sought to ensure uniform railroad safety standards and to preclude "a variety of enforcement in 50 different judicial and administrative systems." H. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109. To this end, Congress enacted an express preemption provision, 49 U.S.C. § 20106, which flatly forbids *municipal corporations* to regulate any subject matter "related to railroad safety or security."[6] FRSA also forbids *states* to enact legislation where, as here, DOT and/or DHS have "cover[ed] the subject matter." *Id.*

Hoping to take advantage of the narrow area left open for *state* regulation, defendants claim that the District is a "state," not a municipality. But, the text of the FRSA exception refers only to "states," and the District is not included in the statutory definition. Congress knows how to identify the District as a state, see, *e.g.*, 49 U.S.C. § 5102(11); it did not do so. The District Act is expressly preempted by FRSA.

Even if the District were considered a state under FRSA, the District Act would be preempted because its subject matter—the en route security of the transportation of

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[6] See *CSXT v. City of Plymouth, Mich.*, 86 F.3d 626, 628 (6th Cir. 1996) (Plymouth's ordinance is not eligible for the preemption exception because Plymouth is not a state). The district court held that the District is a State under FRSA, though FRSA does not define "state" to include the District. The court speculated that Congress did not include such a definition because the District lacked home rule when FRSA was enacted. Dec. 35. But FRSA was amended after 1974 when Congress authorized home rule, and Congress did not amend the definition of "state." Moreover, FRSA authorizes state participation in certain activities upon DOT certification, but the District is not treated as a state for this purpose.

hazardous materials by rail—has been "covered" by the Secretaries of Transportation and Homeland Security and now by the STB through the issuance of its Order. The Secretary of Transportation, through the FRA, administers FRSA and other federal rail safety laws, which encompass "every area of railroad safety." *Id*. § 20103(a). The Secretary issued and enforces federal railroad safety regulations, 49 C.F.R. §§ 200-268, occupying over 700 pages in the Code of Federal Regulations ("CFR"). Through the Research and Special Programs Administration ("RSPA"), the Secretary has also issued regulations "for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce," pursuant to HMTA. 49 U.S.C. § 5103(b). The HMTA regulations applicable to rail, 49 C.F.R. §§ 171-174, 178-180 (over 900 CFR pages), are enforced by the FRA. Both sets of regulations have preemptive effect under FRSA. See *CSXT v. Public Utils. Comm'n*, 901 F.2d 497, 501 (6th Cir. 1990).

Of particular importance, RSPA published a final rule (HM-232) on March 25, 2003, requiring persons, including rail carriers, who transport certain highly hazardous materials, to develop and implement security plans and train appropriate employees in security measures. Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg. 14,510, 14,521 (Mar. 25, 2003) (codified at 49 C.F.R. §§ 172.800-172.804). Both FRA and TSA reviewed CSXT's security plan, including the aspects required by HM-232, and concluded that it complies with this regulation. See Elliot Decl. (A2317-22); Rybicki Decl. ¶¶ 7-9 (A2348-49). Through these regulations, the Secretary of Transportation "covered the subject matter" of en-route security of the transportation of hazardous materials by rail.

These regulations reflect RSPA's determinations that railroads should be afforded the "flexibility to tailor security measures to their particular circumstances" and that "overall safety and security in hazmat transportation are maximized when the total distance and time of such transportation are minimized." U.S. Reply in Support of SOI at 3 (Mar. 21, 2005). (A1710). "RSPA specifically considered and decided against establishing specific routing standards for railroad hazmat security . . . . 68 Fed. Reg. at 14511." *Id.* at 7 (A1714). Indeed, in 2004, the TSA undertook the D.C. Rail Corridor Project to assess the need for enhanced security arrangements on D.C. rail lines and to implement any recommended measures. TSA and CSXT are implementing the recommended changes. See Elliott Decl. (A2317-22).; Rybicki Decl. (A2346-50).[7]

Finally, if there were any doubt on this score, the STB Order itself is plainly an "order" covering the subject matter of the District Act, giving it preemptive effect.

Despite the regulatory action described above, the district court held that the federal agencies administering FRA have not "covered" the subject matter of en route security of hazmat rail transportation. The court erroneously concluded that extant regulations address only "spills or other accidents [but] were not designed to address the risk of terrorism," Dec. 24, and similarly erred in concluding that state regulation is not preempted "until the federal government has devised a comprehensive, nationwide solution" to a particular problem. *Id.* 22. The court also erred in viewing DOT's and

[7] Nor can the District rely on the exception to preemption that allows states to address an "essentially local safety or security hazard" if the state law is not incompatible with federal law and does not unreasonably burden interstate commerce. 49 U.S.C. § 20106. As noted, the District is not a state; in addition, protection of the Capitol is not an essentially local hazard. Moreover, the Act is not compatible with federal law, including the STB Order; and the Act unreasonably burdens interstate commerce.

DHS's consideration of *additional* security regulation as evidence that the federal government had not "covered" this subject matter. *Id.* 24. This is not the law.

Federal regulation covers a subject matter such as the en route security of hazmat transportation by rail, and hence preempts state law, when it directly addresses, "includes" or "embraces" that subject matter "in an effective scope of treatment or operation," *CSXT v. Easterwood*, 507 U.S. 658, 664-65 (1993), a standard unquestionably met by the STB Order, HM-232, and the other regulatory action here. The district court's belief that in order to be preemptive, federal regulations must include particular substantive provisions or highly detailed treatment is simply wrong. See *Easterwood*, 507 U.S. at 67675 (regulation governing maximum speed and warning signs cover "the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings"); *id.* (rejecting argument that federal regulations do not cover the subject matter because their "primary purpose . . . was not to ensure safety at grade crossings, but rather to prevent derailment"). The District Act is preempted by FRSA.

C. The District Act is Preempted By HMTA.

The District Act is also preempted by § 5125(a) and (b) of HMTA, 49 U.S.C. §§ 5101-5127, which ousts state or local regulation that is not substantively the same as federal regulation in specified areas or that is an "obstacle to accomplishing and carrying out" HMTA or an implementing regulation. Courts have struck down state and local efforts to regulate rail transport under these provisions. See *Union Pacific R.R. v. City of Las Vegas*, 747 F. Supp. 1402, 1404 (D. Nev. 1989) (striking down municipal ordinance requiring a permit before transporting hazardous materials through the city "because the effect of the ordinance is to impermissibly delay or virtually stop the transportation of

hazardous materials into" the city); *Southern Pac. Transp. Co. v. PSC*, 909 F.2d 352, 358-59 (9th Cir. 1990) (same). The District Act's requirements differ from those of federal law; in particular, the permit system is inconsistent with federal law. The District Act, at the very least, presents an obstacle to carrying out HMTA regulations. Thus, the Act is preempted under HMTA. [8]

The district court rejected HMTA preemption on the grounds that it is "not impossible for CSXT to comply with federal rail safety and hazardous materials regulations . . . and the District Act," and the Act furthers the overall safety purposes of the federal regulations. Dec. 30. The court is wrong in all respects. First, numerous cases and administrative decisions interpret HMTA to preempt state and local permitting requirements, let alone routing prohibitions, based on their interference with the accomplishment of *national* safety objectives. Second, the District Act's prohibition on Banned Materials denies rail carriers the routing flexibility that the RSPA regulations established. 68 Fed. Reg. at 13515. Finally, the District Act does not further the overall safety purposes of federal regulation, but only the interests of the District.

D. The District Act Violates The Commerce Clause.

On its face, the District Act is protectionist legislation that unreasonably burdens interstate commerce. As noted above, the STB found in its Order that the District Act "unreasonably interfer[es] with interstate commerce." (A1473). "[A] law that overtly

[8] The court's reliance on *National Tank Truck Carriers v. New York*, 677 F.2d 270 (2d Cir. 1982) is inapt. That case was rejected by Congress in 1990 (and the New York rule repealed) when HMTA was amended to prevent one jurisdiction from unilaterally increasing hazards on other jurisdictions' highways to decrease its own hazards. 49 U.S.C. § 5112. This case stands opposed to numerous DOT decisions to the contrary. (A1511).

blocks the flow of interstate commerce at a State's borders" is the "clearest example" of a law that is *per se* invalid under the Commerce Clause. *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978). One state "may not . . . increase[] hazards on the highways of neighboring States in order to decrease the hazards on [its own] highways." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 686 (1981). The District Act has precisely that unconstitutional effect.[9] The district court rejects the Commerce Clause argument based on its view that the District Act is not economically discriminatory. But, a protectionist act may unconstitutionally burden commerce, particularly transportation, without constituting purely economic protectionism. See *Kassel v. Consol. Freightways*, 450 U.S. 662, 687 (1981).

II. Absent An Injunction, CSXT Will Suffer Irreparable Harm.

Where, as here, "a movant's likelihood of success on the merits is especially strong," a movant need only make a "relatively slight showing of irreparable injury" to obtain an injunction. *CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). That said, CSXT, its shippers and their customers face irreparable injury.

The substantial impairment of constitutional rights under the Supremacy and Commerce Clauses is irreparable injury by itself. "[I]rreparable injury" may be established if the challenged state statute "is flagrantly and patently violative of express constitutional prohibitions." *Younger v. Harris*, 401 U.S. 37, 53-54 (1971); see also *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 878 (N.D. Ill. 2000).

[9] The District Act is also an unlawful exercise of legislative power under the Home Rule Act, which precludes the District from interfering with federal authority. See § 602(a)(3) (D.C. Code § 1-206.02).

Equally to the point, CSXT is now subject *both* to a federal agency order declaring the District Act invalid. CSXT cannot exercise its federally protected rights without being branded a lawbreaker by the District and punished. This is precisely the type of injury that the Supremacy Clause should prevent.

Compliance with the District Act would also impose serious operational burdens, disruption, expense and risk on CSXT, its shippers and their customers. The out-of-pocket cost of compliance alone was estimated at $2-3 million annually. Gibson Depo. at 23 (A1618). Financial harm that is not recoverable is irreparable harm. See *AFGE, AFL-CIO v. U.S.*, 104 F. Supp. 2d 58, 76 (D.D.C. 2000).[10] Moreover, because the CSXT network already operates near or at capacity, routing the cars at issue against the efficient flow would reduce the capacity and flexibility of the network. See Gibson Aff. ¶¶ 30-32 (A418-19). The delays, disruptions and managerial burdens imposed by the District Act constitute irreparable harm. See *Long Island Ry. v. IAM*, 874 F.2d 901, 910-11 (2d Cir. 1989). This harm, in turn, causes compounded harm to CSXT's shippers and customers, whose shipments will be delayed by rerouting. As the United States stated: "The D.C. Act would also increase the overall costs associated with hazardous materials transportation, with corresponding effects on the economy." U.S. SOI at 9 (A770).

These are by no means the most damaging aspect of CSXT's irreparable harm. An interstate railroad cannot operate when its federal regulators may be overruled by municipalities and states. Yet, that is the environment in which CSXT now operates;

[10] See *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (irreparable harm when judgment is uncollectible due to the Eleventh Amendment). The district court noted that recoverable loss is not irreparable harm, but CSXT's losses are not recoverable.

other cites and at least one state have initiated copycat legislative provisions and CSXT now operates in a regulatory environment of instability and uncertainty.

III. The Harm To CSXT And The Public Interest Outweighs Harm to the District.

The District will suffer little corresponding harm if the legislation is enjoined pending appeal. The District considered the legislation for a year before enactment and delayed its enforcement from February 15th until April 20th while this litigation proceeded. Comprehensive federal regulation and specific attention by federal agencies to the security of hazardous materials shipments within the District will continue while this Court considers the merits of CSXT's challenge. Moreover, after consultation with the TSA and other federal agencies in the spring of 2004, CSXT voluntarily began rerouting loaded cars of the Banned Materials from the north-south line that runs closest to the Capitol building. CSXT will continue to consult with federal agencies and comply with any federal directives regarding the routing of those cars and other security matters.

The district court was greatly influenced by the risk of catastrophic harm if a terrorist were to attack materials being transported through the District. But all Americans living near rail lines bear the same risk; the District's interest cannot be considered greater than the interests of similarly situated jurisdictions; yet, if all those jurisdictions act solely in their own interest, there can be no rail transport of the hazardous, but necessary, Banned Materials. That is why the Constitution and Congress have delegated national rail regulation to expert federal agencies—not courts, states or municipalities. Indeed, the United States, whose agencies are delegated responsibility for interstate rail transportation, has concluded that the District Act "would negatively affect the United States' interests in national security, public safety, public health, and a strong

economy" by "increasing the aggregate risk" and "adversely affect[ing] the public health and national economy." U.S. SOI at 8-9 (A769-70). "The public interest is always served by the prevention of a violation of the United States Constitution." *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 923 (S.D. Ohio. 2004).[11]

The district court did not find irreparable harm to CSXT or find that the balance of harms favored an injunction based on its conclusion that there were disputes about the *extent* of operational disruption and costs for CSXT and its customers. The court did not address CSXT's demonstration that it could be punished and fined by the District for exercising its federal rights, and did not believe that enforcement of the District Act would have substantial national consequences, notwithstanding the introduction of copycat legislation. Instead, the district court focused on the undoubtedly horrific consequences of a terrorist attack in the District. That horror would be no different, however, in New York or Pittsburgh or Richmond or Philadelphia. And the district court's view that the District is uniquely attractive as a terrorist target simply ignores the reality that an attack focused on hazmats will occur wherever the hazmats are, and the District Act simply shifts these hazards to other jurisdictions. Finally, the district court's conclusion that the public interest will not be harmed because copycat municipal laws are preempted is belied by the legislation recently introduced as state law in California.

[11] Because the United States is also seeking an injunction, no bond should be required. In any event, under Fed. R. App. P. 8(a)(2)(E), the bond requirement is discretionary; and under the circumstances presented, none should be required.

CONCLUSION

For these reasons, the Court should grant the motion and enter an injunction pending appeal. In addition, the Court should summarily reverse the district court's order and grant the motion for a preliminary injunction. Finally, because the District Act is preempted as a matter of law, judicial economy and efficiency support the entry of summary judgment in CSXT's favor.[12]

Respectfully submitted,

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[12] Any injunction should also cover the substantially identical Temporary District Act if it becomes effective. And because the district court asked the parties to begin "further proceedings" immediately, this Court should stay that order until it has acted on CXST's other matters, which might moot further proceedings.

Dated: April 18, 2005

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